IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 10-0132

ROBERT J. COOK
Petitioner and Appellant,

-vs-

DIANA J. MCCLAMMY
Respondent and Respondent

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court,
In and for the County of Cascade, Cause No. ADR 03-380,
the Honorable Thomas McKittrick Presided

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MONTANA CODE ANNOTATED

ADMINISTRATIVE RULES

TABLE OF CASES

MONTANA CONSTITUTION

MONTANA RULES OF CIVIL PROCEDURE

STATEMENT OF ISSUES

ISSUE 1: DID THE DISTRICT COURTABUSE ITS DISCRETION AND ERR IN NOT MAKING THE CSED A PARTY TO THE ACTION AND ERR IN QUASHING THE SUMMONS?

a. DID THE DISTRICT COURT ERR IN DENYING THE PETITIONER'S MOTION FOR ATTORNEY GENERAL AND LONNIE OLSON TO PAY FOR COSTS OF PERSONAL SERVICE?

ISSUE 2: DID THE DISTRICT COURT ABUSE ITS DISCRETION AND CREATE REVERSIBLE ERR WHEN IT DID NOT MAKE ANY FINDINGS OR CONCLUSIONS ON THE ISSUES TO WHICH IT WAS PRESENTED?

ISSUE 3: DID THE DISTRICT COURT MISAPPREHEND THE FACTS WITHIN THIS CASE AND FURTHER MISCONSTRUE THIS COURT'S DECISIONS IN COOK V MCCLAMMY AND COOK V STATE, CSED, THEREFORE CAUSING REVERSIBLE ERR?

A. DID THE DISTRICT COURT ERR WHEN IT DID NOT ORDER RETURN OF SEIZED FUNDS COLLECTED BY CHILD SUPPORT ENFORCEMENTBY EITHER CSED OR RESPONDENT WHEN THE SUPREME COURT ORDERED THAT APPELLANT OWED NO SUPPORT?

B. DID THE DISTRICT COURT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS WHEN IT DID NOT ACT ON ITS ORIGINAL JURISDICTION CONCERNING THE CHILD SUPPORT AND PROTECT THE APPELLANT'S RIGHTS?

STATEMENT OF CASE

The Appellant is appealing the District Court's order which denies him any relief of returning his wrongfully seized funds. These funds were seized and some of the money was retained by the State, CSED, for welfare Mcclammy received and some of the funds were (improperly) distributed to Respondent, Mcclammy. This Court reversed the District Court's order which stated the Appellant owed support retroactive to December 2006, in Cook v Mcclammy. Because CSED had also issued an order for the Appellant to pay support, Appellant had to go thru a separate appeal process and that appeal also ended in this court. (see Cook v State, CSED) Both cases decided that the Appellant did not have an obligation of support, did not owe any child support and that CSED did not have its order approved. The CSED vacillates on its position throughout the whole process, sometimes it says it will have its order approved after this court's decision, then it says it did not modify an order and does not have to. The CSED relies on the District Court order then it again changes its mind once this court remands the issue. The Appellant tried to have CSED return his money based on these decisions to no avail. The Appellant then had summons issued and requested the District Court vacate any order of CSED, return seized funds and cease collections. The Appellant further asked the court to order the CSED to appear and show cause why it had not returned the funds seized, under what authority or order CSED seized the funds and why the CSED actions have not

created a justifiable controversy by impeding on this court's jurisdiction over child support in this matter. From this action came more issues such as jurisdiction, acquisition of jurisdiction, who should be required to repay the support seized, what remedy is available and the constitutionality of MCA 40-5-910 to name a few. The district court failed to make any findings and conclusions on these issues and wrongly denies Appellant motions and remedies defined and available by law. The Appellant timely appeals the order of the District Court.

FACTS OF CASE

The February 4, 2004, Decree filed in the District Court asserts original jurisdiction in this matter. (Docket#8)

The Appellant has appealed to the Montana Supreme Court in regards to this matter on two other separate occasions, Cook v CSED, 2009 MT 237N, and in Cook v Mcclammy, 2009 MT 115.

The District Court does not anywhere in its February 24, 2010 order, (Docket # 59 and Exh A, attached) as noted in the Supreme Court decisions above, find that CSED had not petitioned the district court for approval of its order or that there was no motion to modify child support or that Appellant never received notice from CSED or Mcclammy that the decree would be modified for him to pay support or that Mcclammy never asked for support or that CSED requested Judicial Notice of the Cook v Mcclammy order.

None of the decisions/orders regarding this matter specifically discuss funds already seized or repayment of funds seized. These issues were properly brought before District Court and from these issues more issues arose.

The Supreme Court holding in Cook v State, ¶4: "As a result of our decision in Cook, the District Court entered an order on April 13, 2009, vacating its November, 2007, order requiring Cook to pay child support retroactive to December 1, 2006. Therefore, Cook's only potential obligation to pay child support to Mcclammy would arise from the administrative order of the CSED that is under attack in this present appeal. However, following the District Court order April 13, 2009, CSED state in a

letter to Cook dated April 20, 2009 that "[a]ny outstanding administrative order to withhold will be terminated and any funds withheld after April 17, 2009(the date CSED received notice) will be returned to you." Since the parties' daughter has since turned 18 and since CSED is no longer pursuing payment from Cook the issue regarding the CSED administrative order of child support is moot."

The order does not address funds already seized or the Administrative Order which the Appellant asked to District Court to vacate. The order acknowledges that the District Court did vacate its order as it was to no remand and that CSED received the notice on April 17, 2009 and that is why it vacated its order to withhold and said it would return seize funds. "However, following the District Court order April 13, 2009, CSED…" and it states "since the CSED is no longer pursuing payment". Because the CSED was still pursuing payment (Doc. 41 of docket Exh. __) and that the CSED distributed funds to Mcclammy saying it was for March 2009 support (Doc. 41 of docket Exh. __) even after it received notice of the Court's order in Cook v Mcclammy and the order of Cook v State, the Appellant sought remedy.

Appellant received a letter(Doc. 41 of docket Exh. D) dated April 20, 2009, from CSED Attorney Anderson. Within that letter she states:

> "CSED cannot ask the District Court to approve its administrative order until after the Supreme Court makes its decision in DA 08-0528."

Another letter(Docket # 41 of docket, Exh. H) from Ms. Anderson dated June 1, 2009, states:

> "This is in response to your letter dated May 21, 2009. As I have told you before, nothing will be done with your account until after the Supreme Court issues its decision in the pending case, DA 08-0528."

Appellant received a letter(Docket#. 43, 1 of docket Exh. O) from Lonnie Olson, CSED administrator dated August 7, 2009. On page 2 of the letter it states:

> "The Court stated that its reversal of the child support issue in Cook v Mcclammy was based upon the fact that CSED's order that Cook pay child support to McClammy had not been approved by the District Court as required by §40-5-277(8), MCA" that was not the reason the child support matter in DA 07-705 was remanded to the District Court. Our legal staff have concluded that this in non-bind dicta. The Court determined that the child support issue was moot…" It further states:

> In your letter, you claim that you are entitled to the seized funds. The CSED collected about $3,400 under our order, and sent $1,200 of it to Mcclammy. The remaining funds were retained to offset welfare payments your daughter received from the state. There is no order which requires the CSED to return any money to you. The Supreme Court recognized this, approving the return of funds collected after the date of the decision in DA 07-705…" (emphasis added)(Exh O, Attached to Supplemental Motion, filed August 24, 2009)

The Supreme Court's order does not recognize either that the money was to be retained to offset welfare Mcclammy received or that there is no order to return the seized money to Appellant. Appellant alleges that Mr. Olson and CSED attorney misinterpreted the order and its meaning and the plain language of the order and input words that are not there.

The word "notice" that is within the Supreme Court's decision is within a quotation that is from the CSED Sharon Anderson's letter dated April 20, 2009. Appellant believed the CSED Administrator misconstrued the order. The order does not order CSED to return the money but it certainly does not say CSED can keep the seized funds to offset welfare payments as Mr. Olson asserts. Appellant believed the Supreme Court remanded the matter back to District Court to deal with that issue of relief. The District Court then vacated its order ordering the Appellant to pay support retroactive to December 2006. The Appellant faxed the CSED a copy of the Cook v Mcclammy decision and the District Court's newest order(since it relied on the order in Cook v State before it was reversed. The CSED did terminated its withholding order and the CSED stated it would return any funds its seized after it received the orders. It did not return funds seized after it received the new order and distributed funds to Mcclammy(Docket# 41, Exh H)

The Appellant then wrote several letters(Docket #41, Exhs C,E,I,J,K) to CSED for relief but as per the CSED's letter's state since it did not have an order to return the seized funds, the Appellant sought relief. The order does say "Based on our decision in *Cook* and actions subsequently taken by the District Court and CSED, the issues in this proceeding are moot and the appeal should be dismissed." Also in the Supreme Court order of Cook v State, CSED it clearly states in ¶3, that the District Court order of November 2007 was reversed and "We also reversed the District Court's order that Cook pay an unspecified amount of child support to Mcclammy commencing December 1, 2006."

Appellant asserts both cases are binding precedent for this case.

The Appellant provided case law that provides the district court can order CSED to return seized funds. (See Docket #41, Appellant's Motion, p4 last paragraph and p. 5, 1st paragraph)

The Appellant disagreed with the CSED Administrator's interpretation of the Supreme Court's order and knew the CSED would not see the ruling for how it reads and grant repayment of the seized funds and therefore sought relief thru the District Court.

The District court was the proper forum since it had continuing exclusive jurisdiction over the child support issue.

The Appellant also asserts the district court wrongly interprets the word "notice" and the orders in Cook v Mcclammy and Cook v CSED.

The Appellant believes this wrong interpretation by the District Court is one of basis in which it ruled against Appellant.

The CSED relied on that district order ordering Cook to pay child support retroactive to 2006 which was overturned but now acts ignorant to the fact the order was overturned and states it does not have to have its order approved and that it was not modifying an order. (Docket # 47, page 2, lns 2-5 and ln 15) It further states that it is establishing an order. (lns 15-16, same page)

Based on the decision in Cook v Mcclammy, supra, and Cook v State that the Appellant did not owe any child support the Appellant filed a MOTION FOR CSED TO VACATE ANY ORDERS, CEASE COLLECTIONS AND RETURNED SEIZED FUNDS, in District Court on August 11, 2009. (Docket # 41) The Appellant then filed a Supplemental Brief and had Summons issued on August 24, 2009 (Docket# 43)

The Summons for Sharon Anderson was returned served and shows she was personally served on 10-13-09. (Docket#50) The summons for Attorney General and Lonnie Olson were returned served and shows they were served by personal service on October 23, 2009.(Docket#s 54,55)

The Appellant asserts in his briefs and at hearing that since the administrative order for child support was not approved and that since Mcclammy did not request support and that she had no rights to sign over to the State and CSED was continuing

to try to collect and wrongly distributed funds since the Supreme Court orders and new district court order the Appellant filed motions to get the funds returned.

The Motion was sent to Jeff Ferguson via mail and to the CSED attorney, Sharon Anderson, via certified mail on August 11, 2009.

Because the Appellant was unsure if certified mail sufficed, he filed a SUPPLEMENTAL MOTION FOR CSED TO VACATE ANY ORDERS, CEASE COLLECTIONS AND RETURN SEIZED FUNDS on August 24, 2009.

Appellant mailed a copy of the Supplemental motion to Jeff Ferguson.

Appellant had three Summons issued to accompany the Supplemental Motion and original motion. The three Summons were issued to: Lonnie Olson, Sharon Anderson, and the Attorney General. The Summons, Notice of Acknowledgment and Service (Docket #42) and copy of Motions were sent to Lonnie Olson and the Attorney General. The Summons, Notice of Acknowledgment and Service and receipt of original motion and Supplemental Motion was sent to CSED, Attorney Sharon Anderson.

The District Courts order, dated 8-26-09, set hearing on Appellant's motion(s) for September 18, 2009, at 10:30 a.m.

Appearing at the hearing were the CSED Attorney Sharon Anderson; Attorney Jeff Ferguson, on behalf of Diana Mcclammy, and Robert Cook, appearing pro se. Diana Mcclammy did not appear.

The Court opening statement acknowledges that the hearing is in regards to Appellant's motion to return seized funds. (Tr.p.3, ln 7-8)

The Court acknowledges that Mcclammy may also be responsible for return of the seized funds.(Tr.p. 10, ln 22-24, Tr.p 9, ln 14-25 and Tr.p. 7, ln 17-18)

CSED Attorney Sharon Anderson (hereafter CSED), acknowledges she is representing CSED and asks the court to quash the summons(Tr. p. 3, ln 13-18) and then argues outside the jurisdictional issue why CSED should not be required to refund or reimburse them.(Tr. p 3, ln 23-25, p. 11) Ms. Anderson further argued outside jurisdictional issues and agreed to help the court. (Tr.p. 11, ln 15-21)

The CSED cites MCA §40-5-910(5) (Tr.p. 4, ln 5-21) for the reason the CSED does not have to repay the monies it seized.

Appellant states that everything in case has been decided except the returning of seized funds.(Tr p. 5, ln 4-8). And that Mcclammy had no rights to assign the State. (Tr.p 5, ln 9-19)

Appellant disagrees with CSED's motion under 40-5-910, although he did not hear all her citation of MCA, that the funds were properly distributed. (Tr.p 5, ln 9-11) Appellant also argues the constitutionality of this statute in his reply brief. (Docket #51, pages 8-11) The District court made no decision on this issue.

Appellant sets forth argument that the funds were not properly distributed and that Mcclammy had no rights to assign the State. (Tr.p 5, ln 11-18, Docket#51, p10, last ¶, and Docket#51, p7, based on Stiles v CSED) This case law also notes that *Stiles* did not have an obligation of support as here.

The CSED acknowledges that it has wrongly seized funds but states it can because the statute allows this (Appellant believes she is referring to her citation of MCA 40-5-910). (Tr.p 9, ln 4-9)

CSED agrees with the Court when the court asks, "The agency just doesn't have unfettered power to take money and then to acknowledge that they were wrong but nobody can do anything." (Tr.p 9, ln 15-19)

The Court asks CSED if it wants "to file any further briefs on this matter?" (Tr.p 9, 24-25)

The CSED tries to avoid the courts question if it wants to file any further briefs and again brings up service and being joined a party and that she will address the issue of service and being joined (Tr.p 10, ln 1-6) and then concedes to the court's jurisdiction by agreeing to file a brief.(Tr. p 10, ln 13)

The Court acknowledges the Appellant "feels that he's been wronged." And "that the Supreme Court has agreed. And I think we have an obligation to try to sort through this and set it right." (Tr.p 11, ln 4-7)

The Court inquires about the CSED raising additional issues. (Tr.p. 11, ln 19)

The CSED filed two responses: a Special Response to Petitioner's Motions (Docket#47) and a Motion to Quash Summons and to Dismiss Petitioner's Motions on October 1, 2009.(Docket#49)

Mcclammy filed her response to Appellant's Motions on October 19, 2009. (Docket# 53)

Appellant filed his reply briefs to CSED Motion to Quash Summons and to Dismiss Petitioner's Motion and to CSED's Special Response to Petitioner's Motion on October, 14, 2009. (Docket#51,#52)

The CSED relied on the district court order that Appellant owed support (see Exh G, p3,4 of Motion For CSED to Vacate Any Orders, Cease Collections and Return Seized Funds) then when the Courts vacates the order providing Appellant owes support the CSED changes its position.

The CSED never states how it distributed the funds its seized from Appellant. The Appellant showed the district court how the funds were distributed to the State and Mcclammy by his exhibits and in his Motions and Replies in the amount of $3,599.65. The State seized and retained $3,599.65 of that it distributed $1,200 to Mcclammy. (Docket#41, Exh M) Exh L of Docket#41, Child Support notice of debt owed and payment coupon, shows the CSED was continuing to try to collect $799.10 from the Appellant. This statement is dated July 31, 2009. This after the CSED received the decision in Cook v State, CSED.

Appellant filed his reply brief to Mcclammy's response on October 30, 2009.

Motion for Attorney General and Lonnie Olson to pay for costs of personal service based on the M.R.Civ.P. was filed on October 30, 2009. (Docket # 56)

The district court did not make any factual findings in regards to its original jurisdiction over the issue of child support, jurisdiction over CSED, or the proper service of summons on CSED, CSED administrator or the Attorney General.

Additionally, the district court did not make any findings or conclusions based on law in regards to the issues in this matter. Specifically, regarding the CSED's appearance and participation, the orders noting Appellant does not owe support and the CSED's duty to have its order approved by the court.

The Appellant asserted in his briefs all the following: that his constitutional rights to due process and his constitutional fundamental rights have been violated by Respondent Mcclammy and CSED. The District Court has original jurisdiction in this matter period and the CSED is required by law to notify the court it is modifying its order and have it approved and it did not do so. The CSED created a justifiable controversy and violated the Appellant's constitutional rights when it did not follow statutory laws. Mcclammy started the whole thing by going forum shopping.

During the hearing the court states, "Has your agency ever been involved in wrongfully seizing assets of somebody? And if so, what did you do to remedy it?" (Tr.p.9, ln2-3)

The Appellant asks the District Court in his Reply Brief, Docket 51to CSED on pages 11-12 to order CSED to return the entire $3,599.65 plus interest because it wrongly garnished and seized funds. But also asked the court to consider that Mcclammy repay the $1,200 plus interest.

The last paragraph of the District Court's order states, "In his reply briefings, Mr. Cook, improperly and for the first time, requests back child support from Respondent in the case at bar. Nevertheless, the Court does not find Petitioner's legal argument sufficient to warrant such relief." This was not improper as the court itself opened the door during hearing when it acknowledged that Appellant may be come after McClammy (Tr. p.7, ln 17-18) and when it opened the issue as to briefing if Mcclammy should pay or not and Mcclammy's attorney was present and given a chance to respond because ultimately his client might be the one that is ordered to return the money. (Trp 9, ln 14-25, Tr. p 10, ln 20-25).

Appellant timely filed appeal.

STANDARD OF REVIEW

We invoke the plain error doctrine only where failure to do so would pose the risk of a manifest miscarriage of justice, would leave unsettled the question of the fundamental fairness of the trial proceedings, or would compromise the integrity of the judicial process. State v Jackson, 2009 MT 427, ¶ 42, 354 Mont. 63, 221 P.3d 1213.

The test for an abuse of discretion is whether a district court "acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason

resulting in substantial injustice." Shilhanek v D-2 Trucking, Inc, 2000 MT 16, ¶24, 298 Mont. 101, ¶24, 994 P.2d 1105, ¶24

Adequate findings and conclusions are essential for without them this Court is forced to speculate as to the reasons for the District Court's decision. Such a situation is not a healthy basis for review." Jones v Jones, (1980) 190 Mont. 221, 224, 620 P.2d 850, 852(see also Jacobsen v Thomas, 333 Mont. 323, ¶19 142 P.3d 859, ¶19.

A district court's findings are clearly erroneous if they are not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed. In re Estate of Kindsfather 2005 MT 51, ¶15. (see also In re Marriage of Steinbeisser, 2002 MT 309, ¶17, 313 Mont. 74, ¶17, 60 P.3d 441, ¶17.)

An abuse of discretion occurs when the district court acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. Jacobsen v Thomas, 333 Mont. 323, ¶10 142 P.3d 859, ¶10.

Our standard of review of a district courts conclusions of law in a post-divorce proceeding is whether the court's interpretation of the law is correct. Schmitz v Engstrom, 2000 MT 275, ¶9, 302 Mont. 121, ¶9, 13 P.3d 38¶9.

When the constitutionality of a statute is challenged, we begin with the presumption that the statute is constitutional, and the party attacking the statute has the burden of proving it unconstitutional. (see Seubert v Seubert, 301 Mont. 382,¶12, 301 Mont. 399, ¶12, 13 P.3d 365, 2000 MT 241, ¶12.

We determine the district court interpretation of the law to determine whether the court's interpretation and conclusions are correct. Arnold v Sullivan, 2010 MT 30, ¶18,(citing Clark and Hayes, citations omitted)

ARGUMENT

ISSUE 1: DID THE DISTRICT COURTABUSE ITS DISCRETION AND ERR IN NOT MAKING THE CSED A PARTY TO THE ACTION AND ERR IN QUASHING THE SUMMONS?

b. DID THE DISTRICT COURT ERR IN DENYING THE PETITIONER'S MOTION FOR ATTORNEY GENERAL AND LONNIE OLSON TO PAY FOR COSTS OF PERSONAL SERVICE?

The Rule 4B(2) states:

(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.(emphasis added)

CSED Attorney Sharon Anderson, Lonnie Olson, the CSED Administrator and the Attorney General were all served through service of process as provided by the rules and therefore should have been made a party to the case. Further, Ms. Anderson is an authorized employee/agent of the State and she made a voluntary appearance in this matter as set forth in the following.

In Wamsley v Nodak Mutual Insurance Company, 2008 MT 56, 341 Mont. 467, 178 P.3c 102, this court held:

"The District Court concluded Nodak waived the defense of lack of personal jurisdiction, and submitted to the jurisdiction of the District Court, by its voluntary appearance at the hearing on November 5, 2003, and by failing to properly argue the merits of this defense as required by M. R. Civ. P. 12 and M. Unif. Dist. Ct. R. 2(a). Nodak maintains this was error. First, Nodak argues it is not "found" in Montana pursuant to M. R. Civ. P 4B(1), Montana's "long arm" jurisdiction statute, and that subjecting it to personal jurisdiction in Montana offends due process. Second, Nodak asserts its "limited appearance" on July 23, 2003, preserved the defense of lack of personal jurisdiction, permitting Nodak to argue it at a later unspecified date. Thus, its participation in the November 5 hearing did not waive the defense. The Estate counters that the "limited appearance" is no longer available in Montana, and that such an appearance is simply treated as a motion [*12] to dismiss under M. R. Civ. P. 12. Accordingly, the District Court was correct to deem the motion to be without merit since Nodak failed to argue or brief it within five days pursuant to M. Unif. Dist. Ct. R. 2(a).

We agree with the Estate that Nodak waived its right to argue the defense of lack of personal jurisdiction. The District Court correctly noted that M. R. Civ. P. 12 has effectively abolished the distinction between "general" and "special" appearances. Semenza v. Kniss, 2005 MT 268, P 17, 329 Mont. 115, P 17, 122 P.3d 1203, P 17 (quoting Knoepke v. S.W. Ry. Co., 190 Mont. 238, 243, 620 P.2d 1185, 1187 (1980)). A "limited appearance" in Montana is effectively treated as a Rule 12 motion to dismiss for lack of personal jurisdiction. *See* Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 Mont. 156, 160, 630 P.2d 1213, 1215 (1981). Under M. Unif. Dist. Ct. R. 2(a), a party raising this defense has five days to file a supporting brief or argue its motion. Failure to do so subjects that party to the risk its motion will be deemed without merit. M. Unif. Dist. Ct. R. 2(b). That is precisely what happened here. Nodak's "limited appearance" was in effect a Rule 12 motion. Nodak [*13] did not argue the merits of lack of personal jurisdiction, or even raise the

specific issue, until roughly three and a half months after it filed its initial appearance, and in the interim presented other arguments to the District Court. Under these circumstances, the District Court did not err in finding the Rule 12 motion without merit.
The District Court also correctly determined Nodak's participation in the court proceedings constituted a voluntary appearance under M. R. Civ. P. 4B(2), thus waiving the defense of lack of personal jurisdiction and admitting the jurisdiction of the District Court. M. R. Civ. P. 4B(2) provides that "[j]urisdiction may be acquired by our courts over any person . . . by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee." **As we stated in Spencer v. Ukra, 246 Mont. 430, 804 P.2d 380 (1991), "any act which recognizes the case as in court constitutes a general appearance, and even in the face of a declared contrary intention, a general appearance may arise by implication from the defendant seeking, taking, or agreeing to some step or proceeding in the [*14] cause beneficial to himself and detrimental to the plaintiff, *other than one contesting only the jurisdiction of the court.*"** Spencer, 246 Mont. at 433, 804 P.2d at 382 (quotation omitted, emphasis added). Nodak could have argued personal jurisdiction without subjecting itself to the power of the District Court, but chose not to. Semenza, P 17 (quotation omitted) (stating that a party may argue lack of personal jurisdiction without concern that such argument will "subject [it] to the general power of the court solely because of the response."). Instead Nodak sought affirmative relief from the District Court in its motion to stay on the basis of principles of comity. **By filing motions seeking relief from the District Court "on other, non-jurisdictional grounds . . . [Nodak] admitted the authority and jurisdiction of the court over the company and the case."** Foster Apiaries, 630 P.2d at 1215, 193 Mont. at 160." (Emphasis added)

Based on Wamsley, supra, and being properly served, when the CSED made a voluntary appearance, participated in the court proceedings outside of jurisdictional issues by setting forth arguments outside the jurisdictional issue(Tr. p 3, ln 21-25, Tr.p 11, ln 15-24) i.e., such as under what statute the funds were distributed and when it filed its brief, “Special Response to Petitioner’s Motion”, and when she agreed to help the court(Tr.p10,ln13) the CSED conceded to the District Court’s jurisdiction over it and therefore waived its rights to argue lack of personal jurisdiction and made itself a party to the case. The district court erred in not making findings regarding these very relevant factors and abused its discretion causing err by not making CSED a party to the case. Further, the district court erred in not making

the CSED a party based on Wamsley, supra, because these actions constitute a general appearance.

The District Court erred in quashing the summons and in its February 24, 2010 Order by referring to CSED's appearance as special appearances as special appearances are no longer allowed in Montana and CSED made a voluntary appearance. (See Wamsley, supra) The CSED made a voluntary appearance and therefore the District Court erred in not making the CSED a party. The CSED set forth arguments outside the jurisdictional issue and agreed to help the court(Tr.p 10, ln 13) and by agreeing to help the court, the CSED admitted the jurisdiction of the court and must adhere to its jurisdiction. The Court later in the hearing asked if she was going to "Raise those arguments too." and CSED agreed it would. (Tr.p 11, Ln 19-24)This Court held, in Wamsley, supra, as noted above "special" appearances have been abolished. In fact, CSED could have filed its brief after it received notice from the Court of the hearing. It did not. Instead, CSED made a voluntary appearance at the hearing, argued a motion to quash and stayed for furtherance of the hearing and argued why the CSED did not have to pay the seized funds back under 40-5-910, offered to provide what the agency does to remedy wrongly seized funds (tr.p. 9) and when its confronted with paying back wrongly seized funds(Tr. p 10)(it never did tell the court CSED's remedy), and then filed briefs for relief outside of jurisdictional issues. CSED could have simply relied on its motion to quash and filed

her brief then left it at that but once it also argued in a second brief other non-jurisdictional grounds such as its points of why it does not have to have it order approved, jurisdiction of the CSED, child support, payment entitlement, and due process rights, etc. and asked for relief, CSED admitted the authority of this Court and its jurisdiction over the case and per Wamsley, supra, the CSED waived its right to service process(although it has occurred) and became a party to the case. Based on this law this court should rightly reverse the district court's order quashing the summons and rule the CSED is a party.

This Court should rightly make CSED a party to this action based on the above case law and pursuant to RULE 4(B), the CSED voluntarily appeared when it filed its responsive pleading to Cook's motions and requested relief. The Court order setting hearing did not "order" the CSED to appear and show cause as the Appellant requested. It simply stated the time of hearing and the court had the clerk's office send CSED a copy of the hearing. When the CSED Special Assistant Attorney General, Sharon Anderson, an agent of the Attorney General, showed up on her own accord, argued the CSED position beyond personal jurisdiction, i.e. she argued the CSED jurisdiction of its order and under what authority it acted in her brief, requested relief in furtherance of jurisdiction, she appeared voluntarily. The rules do not say that you can make a special appearance, put in your argument against the allegations, ask for relief and not become a party. By filing her pleading and arguing

on other non-jurisdictional grounds(Wamsley, supra) the CSED has admitted the authority and jurisdiction of the court over CSED and case subject matter and therefore became a party. When CSED agreed to help the court and filed a brief outside the jurisdictional issues, it voluntarily appeared and waived process. The District Court erred in not making CSED a party and therefore erred in quashing the summons.

Further, pursuant to Rule 19, Joinder of Persons needed for just adjudication. States:

> (1) In the person's absence complete relief cannot be accorded among those already parties, (2) in pertinent part, If the person has not been joined, the court shall order that the person be made a party.

Based on this rule this Court should order that CSED is joined as a party. This joinder is prerequisite to the matters at hand in order to properly adjudicate this matter and decide the issues that appear to have the CSED confused as to its authority, jurisdiction, and power and to provide complete relief to Appellant. The CSED needs to be joined as a party. The issues: jurisdiction, return of seized funds, etc. are properly before this Court. The CSED created justiciable controversy(The following criteria fulfils the three part test set out in Seubert v Seubert, 2000 MT 241, ¶22.) when it ignored the decisions directly related to matter; when it ignores the District Court's jurisdiction over child support by enforcing an unapproved order; when it claims it does not need this Court's approval over the child support order; when it claims it did not modify an order when the Supreme Court noted in the

appeals directly involved says it has; when it claims this is the wrong forum, etc. The above and the following issues had to be presented to the District Court: 1) CSED's actions of continuing to enforce an unapproved order after decisions directly related in this case; 2) disbursing funds to Mcclammy it seized after it sent orders stating it would return them to Appellant and claiming the money was March 2009 support; 3) the CSED claiming it did not have to have its order approved; 4) the CSED claiming it not modify the courts order. These are just a few and these actions constituted action by the Appellant because the CSED was not complying with the decisions set out in both other appeals the issue of the child support order and money seized was then was no longer moot. It is clear the misconduct of CSED must be resolved and this Court is the proper forum pursuant to the applicable MCA noted herein, the US and Montana Constitutions. (see Mont. Const. Art VII, sec 4, MCA §40-4-211, this Court's decree which retains jurisdiction and §3-5-302(3) which states the District Court has exclusive original jurisdiction in all civil actions that might result in a judgment against the state for payment of money.) (See also Seubert v Seubert, supra, ¶16,17)) The State needs to be joined as a party for the Appellant to gain complete relief. Complete relief being the CSED repay the all money it seized with an unapproved order and costs. The CSED has statutes it can rely on in order to get reimbursed from Mcclammy such as MCA §17-4-101 et seq.

Appellant further contends the Respondent, Mcclammy, and CSED are trying to relitigate matters that have already been decided. They cannot do this. (see State v Black, (1990) 246 Mont. 39, 44 789 P. 2d 530, 533(citing Zimmerman (1977)(citation omitted)(see also State v Gilder, 2001 MT 121, ¶9, citing State v Wooster, and State v Black, citations omitted) and further both have argued that Appellant has failed to state a claim upon which relief can granted. Appellant disagrees.

Appellant stated a claim upon which relief can be granted in his briefs. The Rule 60 is the rule governing relief from judgment or order. Rule 60(b) states:

> On motion or upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake… (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void (5) the judgment has been … or a prior judgment upon which it is based has been reversed, or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.

Cook has fulfilled the requirements of Rule 60, he asked this Court to void or vacate the CSED orders and return seized funds in the amount of $3,599.65 plus interest,(Trp 6,ln 9) that the child support was seized by the misconduct of CSED because CSED did not have original jurisdiction over the child support matter, it did not notify Cook of its intention to modify this Court's order nor did it have its order approved by the court, the order for which the CSED relies and has not provided, has been overturned by the Court and here, Diana did not have any rights to assign the

State because Cook did not owe support, and therefore the State had no basis for keeping the money it seized to reimburse welfare and relief is sought. The matter was no longer moot and the district court erred in its order when it states the issues would be res judicata because the CSED and Mcclammy were not abiding by the decisions set out in Cook v State, CSED as the District Court claims.

The Court asked CSED to brief the remedy. The court gives the Appellant 10 days to reply. (tr.p. 12, ln 1-19) The Court advised the Respondent should get a copy and a chance to respond. (tr.p. 10, ln 20-24) The CSED asserted that Mcclammy should be responsible for return of seized funds. Mcclammy could have responded to this in her brief when the court gave her attorney the chance to respond and she did not. However, the Appellant replied with remedies.(i.e. the state paid it all back and go after Mcclammy, or the State pay the $2,399.65 plus interest and order Mcclammy to pay $1,200 plus interest.(Docket #51, p.11) The court then dismisses the Appellant's possible remedies because he does so in the reply brief. The Appellant argues this is wrong. The Appellant must be afforded the same opportunity to respond as the Respondent and the CSED. (See Huotari,(1997)supra, and the Mont. Const. Art. II, Sec. 17) The court states it thinks it has an obligation to sort through this and set it right but then abandons the Appellant's remedies without any findings or conclusions of law. It must pursuant to Rule 52 states have findings

and conclusions. For brevity the Appellant will further address the lack of findings and conclusions of law in ISSUE II.

These are just a few of the reliefs Cook has requested. Cook has properly stated claims to which relief can be granted by this Court based on this courts authority and jurisdiction granted by the Montana Constitution, case law and statute. (see Mont. Const. Art VII, sec 4, MCA §40-4-211, this Court's decree which retains jurisdiction and §3-5-302(3) which states the District Court has exclusive original jurisdiction in all civil actions that might result in a judgment against the state for payment of money.) (See also Seubert v Seubert, 2000 MT 241, ¶16,17)

Also the CSED should have been made a party to this case long ago by its own accord. MCA 40-5-277(8) requires the CSED to get this Court's approval of its order. It is quite plain language; the CSED cannot enter its own order and not have it approved by the District Court when the District Court has jurisdiction over child support. This creates controversy and intrudes upon the district courts authority and jurisdiction. Sharon Anderson herself in her letter(Docket 41, Ex. D) dated April 20, 2009, said she "CSED cannot ask the District Court to approve its administrative order until after the Supreme Court makes its decision in DA 08-0528." The Supreme Court did make its decision and ruled the CSED needed to have its order approved by the District Court. (Cook, supra and Cook v CSED, supra) Now CSED changes its stance and argues it does not have to have the its order approved at all. CSED is

wrong in both assumptions as the statute require that the CSED get the order approved before its effective so the argument that she provided is void. She is revisiting and trying to re-litigate matters that have already been decided. These issues also cannot be re-litigated. (State v Black, supra) The CSED has totally ignored procedural law, case law and statutory law throughout this matter and this creates controversy and infringes on the Appellant's constitutional right of due process and infringes on the district court's jurisdiction and authority. Whether it is ignorant of it or is just blatantly ignoring it does not matter as the ignorance in any form is not an excuse to not perform the statutory requirements for modifying a child support order. The CSED has a duty to perform its statutory requirements. (See ARM 42.2.805) Black's Law Dictionary also clearly defines CSED's misconduct as willful, wanton misconduct. The CSED dereliction of duty; unlawful and improper behavior of vacillating on its stance and not following statutory procedure is unconsciousable. CSED cannot say it will get its order approved when this Court issues its opinion then change its stance. The issue of child support has been decided. The Appellant had no obligation of support.(Cook v Mclammy, ¶10) CSED cannot continue to keep Appellant in court and striving for relief because it knows the court would not approve its order because it has been ruled that the Appellant owes no support. This causes the Appellant unnecessary loss of life and liberty because he

defending his rights and has had considerable costs. This also takes up unnecessary time of the courts.

The Supreme Court has held that "when the statutory requirements are not strictly followed, due process rights are abridged." (Isern v Summerfield, 1998 Mt 45, ¶20, 287 Mont. 461, ¶20, 956 P.2d 28, ¶20.) The CSED violated Cook's rights when it did not follow its statutory requirement to have its order approved and ignored pertinent case law that says it must have its order approved also.

a. DID THE DISTRICT COURT ERR IN DENYING THE PETITIONER'S MOTION FOR ATTORNEY GENERAL AND LONNIE OLSON TO PAY FOR COSTS OF PERSONAL SERVICE?

The Appellant is required to serve the Attorney General and CSED in this matter. The Appellant attempted to serve Lonnie Olson, CSED administrator, and the Attorney General pursuant to Rule 4(D) by mailing the Notice of Acknowledgment(Notice) and the Summons. They did not return them within the time allowed. The Appellant then pursuant to Rule 4 had them personally served. Service was acquired within the allotted time pursuant to Rule 4(E). The record shows the Attorney General and Lonnie Olson were served in accordance with the M.R.Civ.P. and therefore because good cause was not shown for not returning the signed Notice and Summons and because the Appellant had to have them personally served, the Court should have ordered the Attorney General and Lonnie Olson to pay

the costs of personal service based on M.R.Civ.P. Rule 4D(b)(i). The District Court erred in denying the Petitioner's Motion for the Attorney General and Lonnie Olson to pay for costs of service. When the Attorney General and Lonnie Olson both refused to return the Notice of Acknowledgement of Service within the 20 days allowed by law the Appellant had them both personally served. M.R.Civ.P. Rule 4(D)(l)(ii) states:

> "unless good cause is shown for not doing so, the court shall order the payment of costs of the personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons."

The Attorney General and Lonnie Olson never provided good cause as required by Rule D as to why they did not return the Notice and Summons. Even more disturbing is the Ms. Anderson asked the Attorney General not to sign and the Notice and Acknowledgment. (Exh Q, in Appellant's Reply to CSED's motion to Quash)

The District Court erred in not ruling the the Attorney General and Lonnie Olson should be required to pay the costs of personal service in the amount of $144.30 based on Rule 4(D)(l)(ii). Again the district court made no findings or conclusions and one is left to wonder how he reached his denial of Appellant's motion to pay costs of service, which brings us to the next issue.

ISSUE 2: DID THE DISTRICT COURT ABUSE ITS DISCRETION AND CREATE REVERSIBLE ERR WHEN IT DID NOT MAKE ANY FINDINGS OR CONCLUSIONS ON THE ISSUES TO WHICH IT WAS PRESENTED?

Absent findings of facts and conclusions of law one is left to guess how the District Court reached its decision. The District Court erred by not making any findings or conclusions of law because it leaves this Court to speculate as to how it reached its decision. (See Jacobsen v Thomas, 333 Mont. 323, ¶19, 142 P.3d 857) The District Court erred by not making the proper findings and conclusions based on law and it erred by not clarifying the issues set before it and noted herein. The District Court has original jurisdiction over child support in this matter. (See MCA §40-5-151(1)(2)(a), the Decree, dated Feb. 4, 2004, Article VII, Sec 4, MCA §40-7-202.) The CSED must pursuant to MCA §40-5-277(8) have its order approved by the District Court. (See also Cook v CSED, 2009 MT 237N, ¶3, and Cook v Mcclammy, 2009 MT 115, ¶3, Mont 159, 209 P.3d 906.)

The District Court does not even acknowledge this Court's rulings in Cook v CSED, and Cook v Mcclammy that the Appellant did not owe support or that the CSED never had its orders approved by the court or that the CSED must give the Appellant notice that it is modifying a district court order and it did not. The CSED never had its order approved by the district court and therefore the funds it seized must be returned because its order is not effective pursuant to MCA §40-5-277(8). The District Court in its order erroneously leaves out important factors regarding this matter and fails to decide the issues presented to it based on the facts of the case and based on the laws of the State of Montana. The district court abused its discretion

when it failed to decide the issues before it that were no longer moot because of the states actions of continuing to try to collect and distributing funds after it received notice of the decision and order(s) that state Appellant did not owe funds.

The Appellant strongly disagrees with the CSED assertion that the district court has no jurisdiction over the child support, that if they ignore the requirement to have its order approved then it does not have to, that they can wrongly seize funds and rely on MCA 40-5-910 to keep the money, they do not have to follow statutory procedure and notify the Appellant and the court CSED intends to modify the court's order, that by failing to follow statutory procedure they did not violate the appellant's due process rights.

The Appellant is asking for seized funds back in his motions. He properly served all parties, including CSED, the CSED administrator and the Attorney General. The CSED wrongly seized funds for child support. The District Court completely and erroneously leaves out the holdings the Supreme Court decision set forth in Cook v Mcclammy, supra, which held that Appellant had no obligation for support, owed no support, that Mcclammy did not request support, and that the CSED did not have its order approved by the district court. The District court made a mistake of law by not understanding the Supreme Court's order of Cook v CSED. The district court interpretation of the order is incorrect.

The Appellant filed his motion in the proper forum. This court has original jurisdiction as noted above. The CSED cannot per Cook v Mcclammy, supra, modify a district Court decree for child support without approval. Appellant properly served the CSED administrator and attorney and the Attorney General. Some of the issues on appeal here been decided pursuant to Cook v State, CSED, supra and Cook v Mcclammy, supra. Other issues on appeal here are directly related to the seized funds and the controversy the CSED created between the judicial powers because CSED and Mcclammy did not follow statutory procedure. The District Court does not address the funds already seized, nor does make any findings or conclusions in regards to the issues Appellant set forth or the new issues which arose in briefing. The decisions in Cook v Mcclammy or Cook v CSED, do not directly state whether the CSED's order for child support should be vacated, the decisions do not address the funds already seized or the return of seized funds or about funds distributed after CSED had notice of the Court's ruling and that is what the Appellant asked the District Court to do. The Decisions state that Appellant does not owe support because proper procedure was not followed but also that CSED never had its order approved and the CSED was not made a party. So, the Appellant this time has properly made CSED a party, notified the Attorney General, etc. and the issues herein stemmed from the CSED's and the District Court's misapprehension of the decisions in both appeals. The CSED claims that Appellant could have filed a stay

but he was told he had to pay while he appealed the CSED order. (Docket#51, Exh R)

The Supreme Court notes in Cook v State, ¶4:

"As a result of our decision in Cook, the District Court entered an order on April 13, 2009, vacating its November, 2007, order requiring Cook to pay child support retroactive to December 1, 2006. Therefore, Cook's only potential obligation to pay child support to Mcclammy would arise from the administrative order of the CSED that is under attack in this present appeal. However, following the District Court order April 13, 2009, CSED state in a letter to Cook dated April 20, 2009 that "[a]ny outstanding administrative order to withhold will be terminated and any funds withheld after April 17, 2009(the date CSED received notice) will be returned to you." Since the parties' daughter has since turned 18 and since CSED is no longer pursuing payment from Cook the issue regarding the CSED administrative order of child support is moot."

Appellant asserts the following 1) The order does not address funds already seized. 2) The Supreme Court order is simply acknowledging that the District Court did vacate its order requiring the Appellant to pay support as it was ordered to on remand and that CSED received the notice of the vacating of the child support order on April 17, 2009 and that is why CSED vacated its order to withhold and that CSED said it would return seize funds received after that date. (although it did not) 3) The Supreme Court found the child support issue moot because CSED was acknowledging the order that Appellant did not owe any support.

The district court misapprehended the affects of this paragraph. It misconstrues its meaning. This Court refuses to "insert" for statutes, the district court certainly should not for case law. The quotation within the paragraph is the Supreme Court

quoting the words of Sharon Anderson from her letter dated April 20, 2010. Nothing more.

The order does state "However, following the District Court order April 13, 2009, CSED…" and it states "since the CSED is no longer pursuing payment". But because the CSED was still pursuing payment (Docket# 41, Exhs. H,K,L,and N) and that the CSED distributed funds to Mcclammy saying it was for March 2009 support (Doc. 41 of docket Exh. H) even after it received notice of the Court's order in Cook v Mcclammy and the order of Cook v State, the issue of child support was no longer moot. Appellant sought remedy.

The State has been ordered to return seized funds before. In Connell v CSED, 2003 MT 361, ¶9-10, it states:

> "On February 3, 1997, the District Court issued it Order and Judgment, dismissing with prejudice CSED's collection action against Connell and awarding Connell his attorney's fees and costs."
> On February 5, 1998, the District Court ordered the release of certain funds and again awarded Connell his attorney fees and costs. In its order, the District Court stated that, "In this case, Connell sought a determination that **he owed no child support whatsoever**…[and] [t]his Court [District Court] **determines that should be the interpretation given the Supreme Court's decision.**" CSED did not appeal this order, …" (emphasis added)

The district court should have based on Connell and precedence set above returned the Appellant's seized funds because he it has been determined that he "owes no child support whatsoever."

The District court was the proper forum since it had continuing exclusive jurisdiction over the child support issue. (see earlier citations for jurisdiction)

The Appellant asserts the District Court misconstrued this Courts meaning of the word notice in Cook v State, CSED. The decisions are binding dicta. The Supreme Court decision in Cook v State, CSED states CSED did not have its order approved, that Appellant had no obligation of support, Mcclammy never asked for support, that Appellant was never given notice of modification of the decree and that is why the CSED terminated its order to withhold.

The district court interpretation of Cook v State is not outlined in its decision and one cannot conclude what the district court thought without findings and conclusions but it appears the Court believes that CSED doesn't have to have its order approved because the court does not mention it. The Appellant disagrees.

The District Court relies on the April 17, 2009, date in its order. (Docket 59, p. 3) states:

> "This court interprets Mr. Cook's lengthy and unfocused complaint as a plea from all back child support, including that which occurred before April 17, 2009, the date the CSED received notice of this Court's Order on Remand; however; the Court also understands that the basis for Mr. Cook's complaint lies in his reliance on this Court's November 13, 2007 Order Modifying Primary Custody and Child Support, which, as stated above, incorrectly assumed there was a child support order to modify. The original order contained no child support order."

The Court clearly misunderstood Appellant's case and the decisions of this Court. First, the April 17, 2009, date is a quotation within the order is from Ms. Anderson. It

is does not have any legal effect. Second, the Appellant did not rely on the November 13, 2007, order. The CSED did though until it was overturned. Third, the statement that "The original order contained no child support order" is clearly wrong. In Cook v Mcclammy, ¶ 10, it specifically states "The District Court Decree of 2004, which provided that Robert had no child support support obligation was in effect until it was modified by the District Court's order on November 13, 2007. Diana had not petitioned for child support." This paragraph is unreasonable.

The district court leaves out the important holding that acknowledges the holdings of both appeal, such as:

"As a result of our decision in *Cook*, …." And right after that where the order states, "Based on our decision in *Cook* and the actions subsequently taken by the District Court and CSED, the issues in this proceeding are moot and the appeal should be dismissed." The district court misconstrued the meaning of the Supreme Court order and should be reversed as it did not make proper findings based on the review of the record. A mistake has been made.

ISSUE 3: DID THE DISTRICT COURT MISAPPREHEND THE FACTS WITHIN THIS CASE AND FURTHER MISCONSTRUE THIS COURT'S DECISIONS IN COOK V MCCLAMMY AND COOK V STATE, CSED, THEREFORE CAUSING REVERSIBLE ERR?

A. DID THE DISTRICT COURT ERR WHEN IT DID NOT ORDER RETURN OF SEIZED FUNDS COLLECTED BY CHILD SUPPORT ENFORCEMENT BY EITHER CSED OR RESPONDENT WHEN THE SUPREME COURT ORDERED THAT APPELLANT OWED NO SUPPORT?

B. DID THE DISTRICT COURT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS WHEN IT DID NOT ACT ON ITS ORIGINAL JURISDICTION CONCERNING THE CHILD SUPPORT AND PROTECT THE APPELLANT'S RIGHTS?

The Appellant asserts that the District court wrongly discusses irrelevant and unfactual issues which have a bearing on his order as noted herein. The District Court misconstrued the Supreme Court rulings and its owns authority and jurisdiction and further acted arbitrarily and without the employment of conscientious regarding the facts of this case. On page two the District Court wrongly asserted that minor child had been residing with Mcclammy undisputed. On page 4 of its order the District Court states, "In his reply briefings, Mr. Cook, improperly and for the first time, requests back support from Respondent in the case at bar." First, the Appellant asked for return of seized funds, <u>not back support</u> and as noted above the Appellant was providing remedies as allowed by due process and the opportunity to respond.

Facts the District Court misapprehended based on the record. The District Court in it order states:

a. Because the CSED was no longer pursuing payment from Cook, issue regarding the CSED administrative order of child support was moot.

Per Appellant's exhibits and briefs, this is not true. The CSED sent him a bill even after the brief was filed. The issue regarding the CSED order is what is what is the

issue, how can the CSED seize funds if the order was not approved and since it did seize funds under an unapproved order, what is the remedy.

b. The Appellant is asking for relief from "all back child support" and acknowledges the court "incorrectly assumed there was a child support order to modify. The original order contained no child support".

   This is an incorrect understanding of the Supreme Court's ruling in Cook v Mcclammy, ¶10 supra. First, the Supreme Court ruling does not discuss funds already seized. Secondly, the CSED distributes funds to Mcclammy even after it received the order; thirdly, the CSED has not had its order approved. Forth, Mcclammy never asked for support during the hearing, fifth, the court cannot modify child support installments until actual notice is given to Appellant and no notice was ever given to Appellant and Sixth, Appellant had no support obligation.

c. The District court states that, "the bulk of Mr. Cook's complaints are with the CSED, who have not been made a party to the present case. Even if the CSED were a party, the issues would be res judicata, because Montana Supreme Court's decision in *Cook v State, CSED, 2009 MT 237N."*

   The issues are not res judicata, because although some have been decided they have not been abided by by the CSED and Mcclammy and the District Court misapprehends the decisions in both previous appeals and abuses his discretion. The CSED did not have its order approved, Appellant has now served and made CSED a

party to the case, Mcclammy never asked for support, the CSED never provided the remedy it said it would for cases like this, the court never ruled on constitutionality of MCA §40-5-910, the court failed to make CSED a party when it was properly served and made a voluntarily appearance, the court never mentions the seized funds taken without an approved order, the court never ruled on its jurisdiction over child support or CSED, the court knows full well that Appellant did dispute his daughter living with Respondent and from when but puts otherwise in his order, the court's earlier determination that it had no jurisdiction over the proceedings or order of CSED was wrong. The court notes he was remanded but does not consider any of the factors set out in Cook v Mcclammy, supra. The Court clearly abused its discretion.

Appellant's assertion MCA §40-5-910 is unconstitutional.

The CSED relies on MCA §40-5-910 as a basis it does not have to return the wrongly seized funds it took from the Appellant. The Appellant asserts this statute is unconstitutional as it denies the Appellant his constitutional due process rights by not allowing him relief provided by the R.Civ. Procedure, Statute and case law.

During hearing the CSED relied on MCA §40-5-910, as quoted by CSED,

> "..If payment properly distributed under this section is later determined by a court or by department decisions to be refundable to the obligor for any reason, except for when the department is the obligee, the department need not pay the refund or recover the refunded amount from the obligee or form any person or agency to who the amount was distributed."

The Court said he would take the motion under advisement. The CSED again relies on this statute later in hearing. (tr. p.9, ln4-9) The Court never made any decision on this this. The Court then inquires that "The agency just doesn't have the unfettered power to take money and then to acknowledge that they were wrong but nobody can do anything. And I think that's what you're saying." The CSED also relied on this in her brief and the Appellant challenged the constitutionality of this statute in his reply brief. The CSED relies on this statute to not follow statutory procedure required in order to take funds and not return them. It can't make up its own rules or procedures. Specifically, CSED got an administrative order, never had its order approved by the district court, seized the Appellant's monies, and now claims under this statute that it does not have to return the funds. The court erred by not finding this statute in violation of the Appellant's rights. No person shall be deprived of life, liberty or property without due process of law. (See Huotari, 284 Mont 285, 943 P.2d 1295, 1299(1997), Mont. Const. Art. II, Section 17). This statute deprives Appellant of due process by not requiring Mcclammy or the CSED to give notice it intends to modify a district court order, to have its order approved by the district court and seizing funds and no relief can be granted by a district court which has that authority as noted herein. Further, and more importantly it takes away the authority divested in the district court to hear cases and order relief. A statute cannot take away the authority or jurisdiction that the Montana Constitution, Art. VII, Sec 4, gives the

district courts. Also in Seubert v Seubert, 2000 MT 241, ¶35, the Supreme Court defines judicial power:

> "Judicial power is the authority not only to decide, but to make binding orders and judgments." State ex rel. Bennett v Bonner, (1950)(citation omitted), we state the expression 'judicial power' means the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."…"

Based on this law the district court had the authority to decide this case, pronounce judgment and carry it into effect and MCA 40-5-910(4) denies the courts of that power. This statute says the CSED can take Appellant's money wrongly and keep some and distribute some the funds, even wrongly, and there is no remedy. Due process requires the CSED have its order approved by the district court and the CSED child support order is not affective until approved(see MCA §40-5-277(8) MCA 40-5-910 violates the Appellant's due process rights because it allows CSED and its administrative court to not follow the procedural law of MCA §40-5-277(8) and have its order approved and then collect and make any party responsible for repayment even if wrongly taken. Due process is abridged when statutory requirements are not strictly followed. (See Isern v Summerfield, supra.)As here, the CSED seized funds under an unapproved order and as here the CSED's stance is if the Appellant tries to get his money back, MCA 40-5-910 says the courts can't enforce an order for reimbursement or do anything to help the Appellant who's rights have been adversely affected by CSED actions or lack of action in this matter, therefore violating the court's authority and the Appellant's due process rights. MCA

40-5-910 does not allow for any remedy, especially when funds are wrongly seized as they have been here because no support was due. Further, the funds could not have been "properly" distributed as the CSED asserted if the order to seize them was never approved. The CSED just blatantly ignores its duty to have its order approved by the district court because it relies on this statute to keep wrongly seized funds. This statute is unconstitutional and abridges the Appellant's due process rights. The CSED cannot enact rules that exceed its authority provided by statute, they are invalid. (See Taylor v Taylor, (1995) 272 Mont. 30, 25, 899 p.2d 523, 526; See §2-4-305(6), MCA) Here the CSED has wrongly relied on CSED authority to execute the child support order before the district court approved it because the district court already had jurisdiction over the child support and then the CSED relies on MCA §40-5-910(4) to not be responsible.

MCA §40-5-910(4) could also be interpreted that CSED is not except from returning money as the statute clearly states within, "except when the department is the obligee". In this matter it has been shown that the department was the obligee and this creates the exception that the CSED can be order to repay the funds.

The Appellant argues that by Mcclammy failing to petition the district court and ask for modification and by failing to notify the Appellant she wanted modify the child support and custody and by the CSED failing to have its order approved and Mcclammy not having rights to assign the state based on the record but still

enforcing it and seizing funds the CSED violated the Separation of Powers violated the Separation of Powers doctrine, under Art. III, Sec 1.(see Seubert v Seubert, 301 Mont. 382, ¶33-34). Per Seubert, ¶34, no person or persons can exercise any power properly belonging to another branch. The CSED violated the separation of powers by executing an order that was not approved and therefore wrongly seized Appellant's funds. Also by district court failing to act on its authority and use its judicial power and carry into effect its order that the Appellant did not owe support per Cook v Mcclammy, supra, the court abused its discretion and violated the constitution and the Appellant's constitutional rights.

To believe the Supreme Court meant that Cook owed support up to the date the date the CSED received notice is ludicrous and shocks the conscientious because the CSED had notice of the Cook v Mcclammy long ago when it requested the district Court record. The district court incorrectly took the notice that the Appellant had to pay support until that date. Further, if the CSED really believed that it did not have to have its order approved then why would it terminate its latest order to withhold based on the ruling in Cook v Mcclammy.

Summary

Based on the legal authorities herein, the CSED should have been made a party, the CSED child support order needs approval of the district court per the decisions in the previous appeals. CSED was still enforcing its order which has never

been approved by the district court and the district court cannot just disregard its authority and jurisdiction because it is unsure what to do and let the CSED and Mcclammy abridge the Appellant's constitutional rights. The Appellant asserts the child support order itself and orders withholding are two separate orders and in Cook v State, supra, the decision only dealt with orders to further withhold. The decision in Cook v Mcclammy finds the Appellant did not owe any support and that the decree provided that Robert had no child support obligation, ¶10. The district court's referral and reliance to the "neither party was required to pay any child support at that time." and "the original order contained no child support order" is an abuse of the courts discretion based on the decisions set before it because the issue of whether the Appellant owed support has already been decided. The District Court erroneously relies on unsubstantiated findings and incomplete partial facts and distorts the Supreme Court's ruling by not ruling on the issues before it. The CSED was continuing to seize funds under its order by the order to withhold and not return them as required. CSED was continuing to assert they did not have to have its order approved. The lower court never made any findings or conclusions of law on these issues. The child support order was not longer moot. The CSED contends, and Appellant disagrees, that it does not have to have its order approved, this issue among several others were never addressed by the district court. The District court erred by not ordering the CSED to return his seized funds. It has no legal authority to

keep them. The CSED should be required to repay all funds since it refused to follow statutory requirements in order to enforce it. It is clear that CSED was acting on the wrong assumption that Mcclammy had rights to assign to the state which clearly she did not per the Decree that the CSED had access to.

CONCLUSION

The Appellant hereby respectfully requests this Court for the following relief: reverse the District Courts ORDER in its entirety; join CSED as a party; order the CSED Administrator and Attorney General pay the costs of personal service and order CSED to return the seized funds in the amount of $3,599.65 plus interest.

CSED's attempts to severe itself from the both this Court's and the District Court's jurisdiction have been unreasonable and vexatious. The Appellant requests this Court order the CSED pay his costs of the appeal.

Dated this 20th day of May, 2010.

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Robert James Cook
Appearing Pro se

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT BRIEF with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing APPELLANT BRIEF

upon each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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Dated this 20th day of May, 2010

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CERTIFICATE OF COMPLIANCE

Robert James Cook hereby certifies the foregoing Appellant Brief complies with Rule 27, M.R.App.P, as follows: the brief has been double spaced, except for

indented material which has been single spaced; the brief is proportionally spaced by Word, typeface is New Times Roman normal font; point size used is 14 point and the word count is 7,945 and the page count is 29 excluding covers, Appendix, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

Dated this 20th day of May, 2010.

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Robert James Cook
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